No. 92-2038

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ASGROW SEED COMPANY,

Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER, d/b/a DEEBEES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PETITIONER

AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
GARY L. NEWTSON, President
2001 Jefferson Davis Highway
Arlington, Virginia 22202
(703) 415-0780

*J. MICHAEL JAKES
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-4000
Counsel for Amicus Curiae.

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**Counsel of Record*

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STATEMENT OF INTEREST

The American Intellectual Property Law Association (AIPLA) is a national association of more than 8,000 members, primarily attorneys, whose interest and practice lie in the areas of patent, copyright, trademark, trade secret, and other intellectual property law. The AIPLA's

members are employed by private law firms, corporations, universities, and government. The AIPLA has no interest in either of the parties to this case.

The AIPLA is concerned with the proper interpretation of important Federal statutes, such as the Plant Variety Protection Act (PVPA), which protect various forms of intellectual property. In particular, the AIPLA is concerned with the balance between the encouragement of innovation and the right of the public to freely reap the benefits of such innovations.

The Federal Circuit's decision in this case is troubling because it *discourages* innovation in the seed industry, thus upsetting this balance. Specifically, the decision allows farmers to sell massive quantities of novel varieties of seed in direct competition with the seed developers, diluting the rights granted by the PVPA to the point where they are meaningless. As recognized by Circuit Judge Newman in dissent, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. C, p. 30a.

The AIPLA believes that its views will be helpful to the Court in understanding the impact of the decision below on the PVPA and, in particular, in understanding how that decision has totally upset the balance created by Congress between encouraging innovation in the seed industry and addressing the needs of farmers who use protected seed varieties. The AIPLA therefore submits this brief in support of the petitioner and urges that the decision of the Federal Circuit should be reversed.

The AIPLA has received the consent of the parties in this case to present its views.

SUMMARY OF ARGUMENT

This case involves a question of statutory interpretation of the Plant Variety Protection Act (PVPA), which Congress enacted to provide legal protection for the developers of novel seed varieties. The Federal Circuit interpreted 7 U.S.C. §2543 of the PVPA, which allows a farmer to save seed and, in limited circumstances, to sell "such saved seed," as permitting up to *half* of a farmer's entire crop to be sold as seed. Not only is this decision at odds with the statutory language and the legislative history of the PVPA, but it frustrates the purpose of the PVPA by allowing farmers to sell novel seed varieties in direct competition with the seed developers. By authorizing this practice, the Federal Circuit's decision drastically erodes the protection for novel seed varieties that Congress intended to provide in enacting the PVPA. As a result, the seed industry's incentive to make significant investments in research and development of new seeds is severely diminished. Ultimately, the national interest will suffer by not having the greater quality and variety of agricultural products on the market that the PVPA was enacted to encourage.

ARGUMENT

I.

THE PURPOSE OF THE PLANT VARIETY PROTECTION ACT IS TO PROMOTE INNOVATION IN AMERICAN AGRICULTURE

The Plant Variety Protection Act (PVPA), 7 U.S.C. §§2321-2582, enacted by Congress in 1970, provides patent-like protection for novel varieties of sexually reproduced seed, transplants, and plants. The goal of

Congress in enacting the PVPA was to increase the competitiveness of American agricultural products in world markets and, ultimately, to result in the development of superior products more resistant to disease and higher in overall yields and quality. This purpose is reflected in the legislative history, *see* H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1-3 (1970), *reprinted in* 1970 U.S.C.-C.A.N. 5082, 5082-83, as well as the language of the statute itself. 7 U.S.C. §2581.

To achieve this purpose, the PVPA provides limited exclusive rights for a term of 18 years to breeders of novel plant varieties who obtain a Certificate of Plant Variety Protection from the Plant Variety Protection Office. 7 U.S.C. §§2482-83. This Certificate grants the breeder the right "to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom." 7 U.S.C. §2483(a); see also 7 U.S.C. §2541.

Through its grant of exclusive rights, the PVPA provides incentives for seed companies to increase their investments in research and development of novel seed varieties, thereby achieving the purposes of the Act. Without these exclusive rights, there is much less incentive to develop new seed varieties. Once a desirable seed variety is sold, any farmer can grow a crop with it, producing many times the quantity of the seeds originally purchased. The farmer can then sell the seeds in direct competition with the seed developer, but at a much lower price, since that farmer has not incurred the costs of developing the new seed variety.

In enacting the PVPA, Congress expressly balanced the plant breeder's exclusive rights with the practical needs

of farmers who would purchase and use the protected seed varieties. Under the Act, a farmer could, of course, sell seed produced from a protected seed variety for "other than reproductive purposes" – e.g., food or animal feed. 7 U.S.C. §2543. With soybeans and wheat, for example, the primary value component of the crop is the seed (for uses other than reproduction), and farmers are naturally allowed to sell the seed as a crop. By limiting the purposes for which the seed could be sold, however, the Act ensures that farmers can not enter into competition with the seed developers who sell the seed, not as a crop, but for reproductive purposes.

In addition, farmers are allowed to continue their usual practice of saving part of their crop as seed for replanting on their own farms. To qualify for this exemption, however, the seed must not have been grown "as a step in marketing (for growing purposes)" the seed. *Id.*; 7 U.S.C. §2541(3). Thus, the first sentence of section 2543 provides:

> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm or for sale as provided in this section . . . .

Section 2543 also permits a farmer who does not use the seed saved pursuant to the first sentence of section 2543 to sell it to another farmer, provided that neither farmer is in the seed business:

> [I]t shall not infringe any right hereunder for a person, whose primary farming occupa-

> tion is the growing of crops for sale other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

Id. Thus, as a practical matter, the quantity of seed that a farmer can sell to another farmer *as seed* is limited to the quantity reasonably necessary for the same farmer to produce another crop of the same size as that he or she produced with the seed brought from the statutorily-protected seed development company.

II.
THE FEDERAL CIRCUIT'S BROAD INTERPRETATION OF THE "FARMER'S EXEMPTION" NULLIFIES THE ACT AS AN INCENTIVE FOR INNOVATION

The dilemma inherent in this case is how to interpret the scope of the exemption in section 2543 while still retaining Congress' aim in enacting the PVPA of encouraging innovation in the seed industry. In one early PVPA case, appealed before the advent of the Federal Circuit, the Fifth Circuit expressly recognized that the "farmer's exemption" in section 2543 is somewhat at odds with the primary purpose of the PVPA:

> While the main body of the Act assures developers of novel varieties of the exclusive right to sell and reproduce that variety, the crop exemption dilutes that exclusivity by allowing individual farmers to sell the protected variety without liability. The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains.

Delta & Pine Land Co. v. Peoples Gin Co., 694 F.2d 1012, 1016 (5th Cir. 1983). Thus, the court concluded that a narrower interpretation of the exemption was "more in keeping with Congress' primary objective." *Id.* The court further elaborated that a more narrow reading of the exemption in section 2543 "creates the greatest amount of internal harmony in the overall statutory scheme." *Id.*

Instead of reading the exemption narrowly in keeping with Congress' objective, the Federal Circuit in *Asgrow Seed* interpreted section 2543 as permitting *up to half of a farmer's entire crop to be sold as seed.* By this interpretation, the Federal Circuit has rewritten the statute and totally upset the balance desired by Congress between encouraging innovation in the seed industry and addressing the needs of farmers. "Although it may appear that the broadest reading of the exemption would benefit farmers today, it could be detrimental to their interests tomorrow." *Delta & Pine Land Co.*, 694 F.2d at 1016.

Specifically, the Federal Circuit in *Asgrow Seed* held that section 2543 does not limit the quantity of seed a farmer can save, Pet. App. A, at pp. 6a, 10a-11a, and that the only quantitative limit on sales of protected seed varieties is that the seller and buyer must be persons whose "primary occupation is the growing of crops for sale other than reproductive purposes." Pet. App. A, at pp. 7a-8a. Thus, under the court's reasoning, the only limit on the quantity of seed sales permitted under section 2543 is that a farmer must grow more crops (whether measured in tonnage or dollar value is unclear) for sale to consumers than for sale to other farmers for planting. Pet. App. A, at p. 8a. The court further held

that this "primary farming" determination must be made on a "crop-by-crop" basis with respect to each novel variety protected under the Act. *Id.*

The Federal Circuit's decision reaches a result that is totally contrary to Congress' intent in enacting the PVPA. It essentially allows farmers to sell large quantities of novel seed varieties, thus entering into competition with the seed developers. By allowing up to half of a farmer's crop to be sold as seed for reproductive purposes, the Federal Circuit authorizes this undesirable practice. Surely, allowing farmers to enter into competition with the seed developers is not the result that Congress intended in enacting the PVPA. As the district court's opinion in this case points out, allowing farmers to sell virtually unlimited quantities of seed developers' protected seed strains frustrates the intent of the PVPA. Pet. App. B, at p. 23a. The more that farmers are allowed to compete with the seed developers, the less likely it is that there will be innovation in the field. The national interests in having new and improved plants on the market will likely suffer as a result of the Federal Circuit's ruling.

Moreover, the Federal Circuit's interpretation of the statute is neither required nor supported by the statutory language or the legislative history. Although the court recognized that, "without meaningful limitations, [section 2543] could undercut much of the PVPA's incentives," Pet. App. A, at p. 12a, the limitations the court adopted find no support in the Act. Nothing in the text or the legislative history suggests that a farmer may sell up to 50% of a crop for seeding purposes as determined on a crop-by-crop basis.

A more logical reading of the statute, in keeping with the Act's purpose, is that the first sentence of section 2543 limits the quantity of saved seed subject to being sold to the quantity needed to produce another crop of the same size as the first crop. As Judge Newman explained in her dissent, section 2543 was designed to "permit continuation of the historical practice of farmers to save seed for their own use, *with occasional minor transactions with neighbors on this saved seed.*" Pet. App. C, at pp. 37a-38a (emphasis added). Such an interpretation of the statute is consistent with the statutory language, the express intent of Congress, and the stated purpose of the PVPA.

III.
BY DISCOURAGING INNOVATION IN THE SEED INDUSTRY, THE FEDERAL CIRCUIT'S DECISION WILL ULTIMATELY HURT AMERICAN AGRICULTURE

The PVPA is critically important to the private seed industry's research activities in developing novel seed varieties and bringing them to the public. Without some form of legal protection against the sale of protected seed, developers of novel seed varieties will not be able to recoup their extensive research and development costs. By allowing up to half of a farmer's entire crop to be sold as seed for reproductive purposes, however, the Federal Circuit's decision drastically erodes the protection of the PVPA and discourages innovation in the seed industry.

Moreover, such a disincentive to the seed industry creates a chain effect: the less time and money the seed companies spend on research and development, the smaller the chance of discovering superior varieties of seed. The smaller the chance of discovering novel seed varieties, the less chance consumers have to reap the

benefits of such potentially superior products. *See Delta & Pine Land Co.*, 694 F.2d at 1016 (tracing long-term effects of giving broad construction to PVPA exemption). Therefore, it is clear that the effects of the Federal Circuit's decision in this case spread well beyond the private seed industry.

The Federal Circuit's decision, if left unchecked, will have potentially devastating effects on innovation in the seed industry, and consequently, the competitiveness of American agriculture. Ultimately, the national interest will likely suffer from decreased innovation in the seed industry.

CONCLUSION

For these reasons, the American Intellectual Property Law Association as *amicus curiae* urges this Court to reverse the decision of the Federal Circuit in this case.

Respectfully submitted,

J. MICHAEL JAKES
FINNEGAN, HENDERSON,
FARABOW, GARRETT
& DUNNER
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-4000
Counsel for Amicus Curiae.

AMERICAN INTELLECTUAL
PROPERTY LAW ASSOCIATION
GARY L. NEWTSON, President
2001 Jefferson Davis Highway
Arlington, Virginia 22202
(703) 415-0780